IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 25.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-825; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-839; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-832; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-826; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-828; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-829; AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. B-830, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR, *Petitioners,*

against

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

AND

UNITED ELECTRICAL AND RADIO WORKERS OF AMERICA, AFFILIATED WITH THE COMMITTEE FOR INDUSTRIAL ORGANIZATION, *Intervenor-Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND ITS ABOVE-NAMED LOCAL UNIONS, TO BRIEF OF RESPONDENT, THE NATIONAL LABOR RELATIONS BOARD.

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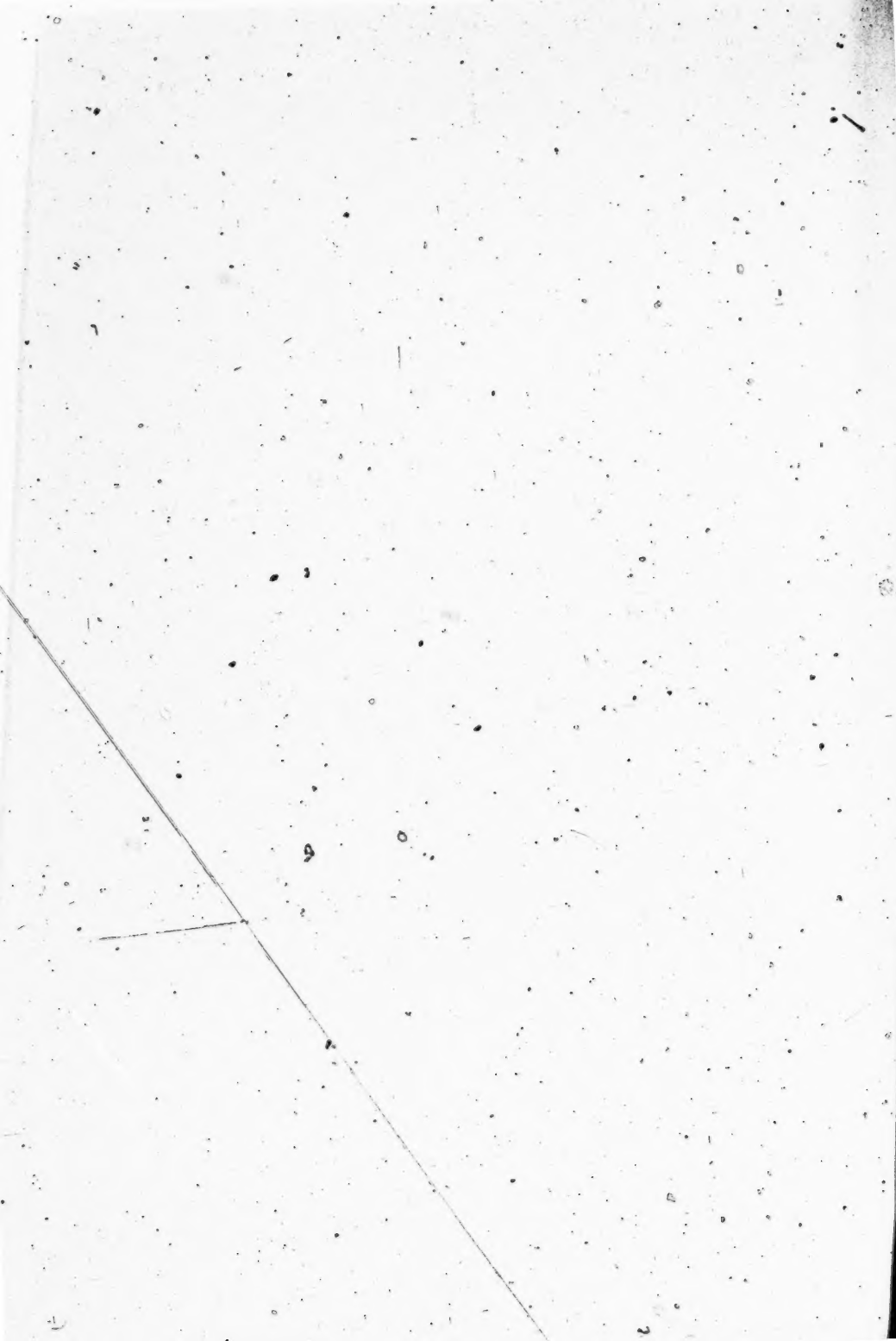

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I.

THE NATIONAL LABOR RELATIONS BOARD MISCONCEIVES THE FACTUAL SITUATION BEFORE THIS COURT IN THAT THE BOARD ASSUMES, WITHOUT ANY JUSTIFICATION IN THE RECORD FOR SUCH ASSUMPTION, THAT PETITIONERS WERE GIVEN ACTUAL NOTICE AND HAD ACTUAL KNOWLEDGE OF

PROCEEDINGS CONTEMPLATING THE DESTRUCTION OF PETITIONERS' PROPERTY AND CONTRACT RIGHTS. AND THE BOARD MISCONSTRUES THE SCOPE OF THE QUESTIONS PRESENTED BY THESE PETITIONERS IN THAT THE BOARD ASSUMES THAT PETITIONERS CONCEDE THE EXISTENCE OF "ACTUAL NOTICE" OR "ACTUAL KNOWLEDGE" OF SUCH PROCEEDINGS, ALL OF WHICH IS, AND AT ALL TIMES HAS BEEN, EMPHATICALLY DENIED BY THESE PETITIONERS.

Ignoring the provisions of the National Labor Relations Act [Section 11 (4)] and its own Rules (Series 1, Article V, Section 1), and disregarding the mandatory rule of law that jurisdiction, especially in administrative proceedings such as this, must affirmatively appear by and from the Record, the Board now attempts to justify its omission to join Petitioners as parties by contending, not that Petitioners were given *legal notice,* or were otherwise legally brought into the proceedings, but that Petitioners had *actual notice* and *knowledge* of proceedings which were ultimately applied to *destroy their property and contract rights;* and by insisting, further, that the burden is upon Petitioners affirmatively to establish that the Board did *not* have jurisdiction over and did *not* give legal notice to these Petitioners.

The Board apparently concedes that neither the provisions of the Act nor of its Rules and Regulations (see Petitioners' principal brief, pp. 7-8, for text of Act and Rule) governing notice and service of process were complied with, as in fact, and as the record reveals, they were not, but rests its contention as to personal jurisdiction solely upon the alleged *actual notice* and *knowledge.* The Board so frankly states its position in its Brief, No. 25, page 2.

The Board does assert (Brief, p. 3) that a copy of the Complaint and notice of hearing was "delivered by West-

ern Union Messenger Errand Service *addressed* to petitioner International Brotherhood of Electrical Workers *at the office of its Local No. 3,* at 130 (actually addressed to 103) East 25th Street, New York City, on May 12, 1937," and that receipt of the same was acknowledged on the delivery ticket as follows: "Loc 3 IBEW D Kaplan", (for accuracy see 1 Rec. 18-19), and that a copy of the amended notice of hearing *was served upon the Brotherhood* by registered mail, return receipt requested, at *130* East 25th Street, New York City"; but the Board does not explain why Local Union No. 3, rather than the International Brotherhood or any of its seven local unions whose rights were affected, was selected for such "notice", although the Board knew the address of at least one of the local unions involved (R. 256, 273, 276, 277); nor does the Board, in any respect, deny that Local Union No. 3 was not one of the local unions whose contracts were destroyed by the Board's Order or whose members were employes of the Consolidated Edison System; nor does the Board attempt to justify the unexplained absence of the return receipt or the omission of reference to the return of the same in the clerk's affidavit for the alleged service by registered mail of the amended notice of May 25, which *return receipt is expressly required as proof of service by the Act and the Rules of the Board;* nor does the Board attempt to show how the assumed notice to one local union (not in any manner or respect interested in or connected with the proceedings) may be a valid service of process upon the International Brotherhood or upon another Local Union, all of which are separate and distinct entities, as this Court and other jurisdictions have unequivocally held (see Petitioners' Brief, pp. 34-36).

Exclusive of these serious and, it is respectfully submitted, fatal deviations from the procedure prescribed

and required by the Act and Rules of the Board, which would, in themselves, seem to establish affirmatively and conclusively that there was not even any *actual notice* given to Petitioners, if *actual notice* rather than *legal notice* suffices, is the deeply rooted principle of law and procedure that, where a special administrative board or tribunal is clothed with jurisdiction for particular purposes, such jurisdiction, in cases in which its exercise is attempted, must *affirmatively* be shown *by the proceedings themselves* to have been acquired. In *Galpin v. Page*, 85 U. S. 350, 370, this Court, after referring to "the distinction in the presumption of law when applied to the proceedings of a court of general jurisdiction, acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority," states:

> "The distinction, nevertheless, has long been made by courts of the highest character, both in this Country and in England, and we had supposed that its existence was not open to discussion: 'However high the authority to whom a special statutory power is delegated', says Mr. Justice Coleridge of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction *plainly appear*, and that the terms of the statute are complied with. The rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions.' *Christie v. Unwin*, 3 Per. & Dav. 208.
>
> " 'The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, *must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it.*' *Morse v. Presby*, 5 Frost. 302."

There is not, moreover, and there cannot be, any showing, either within or without the Record, that Petitioners

were given actual notice or had actual knowledge of proceedings which contemplated the abrogation of their contracts and the consequent destruction of their personal and property rights.

So tenuous is the Board's argument as to *actual notice* and *actual knowledge* on the part of Petitioners, that it is compelled (see Board's brief, No. 25, pp. 3-5) to rest its contention upon what it declares to be a variety of *estoppel*, namely, that although the Record does not indicate even *actual notice* or *actual knowledge* of the proceedings on the part of Petitioners, yet, because, as the Board asserts, its answer to Petitioners' petition for review in the Court below averred that Petitioners had actual notice of the proceedings, and because this vague averment in its Answer was not expressly denied by the Petitioners, it necessarily follows that Petitioners had *actual notice* and *knowledge* of the proceedings concluded [illegible] Order. However, the

and required by the Act and Rules of the Board, which would, in themselves, seem to establish affirmatively and conclusively that there was not even any *actual notice* given to Petitioners, if *actual notice* rather than *legal notice* suffices, is the deeply rooted principle of law and procedure that, where a special administrative board or tribunal is clothed with jurisdiction for particular purposes, such jurisdiction, in cases in which its exercise is attempted, must *affirmatively* be shown *by the proceedings themselves* to have been acquired. In *Galpin v. Page*, 85 U. S. 350, 370, this Court, after referring to "the distinction in the presumption of law when applied to the proceedings of a court of general jurisdiction, acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority," states:

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To be inserted on page 4 of the **Reply Brief** of the Brotherhood and Local Unions immediately following the quotation from *Galpin v. Page*, 85 U. S. 370:

Settlemier v. Sullivan, 97 U. S. 444.
Ex Parte Smith, 94 U. S. 455.
Cheely v. Clayton, 110 U. S. 701.
Bors v. Preston, 111 U. S. 252.
Sabariego v. Maverick, 124 U. S. 261, 292-293.
Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 137, 147-148.
Cooper v. Newell, 173 U. S. 555, 572-573.
Old Wayne Life Assn. v. McDonough, 204 U. S. 8, 16-17.

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> "The Petitioners respectfully ask that the Board's request for the enforcement of the said Order be denied, *upon each and all of the grounds stated in the petition for review verified and filed by these Petitioners on November 18, 1937,* * * *."[1]

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[1] The Petition filed by these Petitioners in the Circuit Court of Appeals for the Second Circuit for review and vacation of the Board's Order of November 10, 1937, explicitly stated (R. 1568, *et seq.*).

"Seventh. Your Petitioners, further, respectfully show that the said Complaint as first and originally issued by said Board through its said Regional Director and served upon said Respondent Companies did not allege that the matters and facts stated in paragraph 22 affected interstate commerce, but, on the contrary, paragraphs 23 and

The Board's theory that its omission to join Petitioners as parties was cured because Petitioners must be held to have had *actual notice by estoppel* is a most startling one when it is remembered that it was within the full and complete power of the Board, if it had desired to exercise its prerogatives, not only to have joined Petitioners as parties to proceedings which operated so destructively upon their rights, but also to have served upon them at their principal places of business, as required by the Act

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24 of said original Complaint, hereinabove literally recited, specifically alleged that the activities of the Respondents set forth in paragraphs 16 to 21, inclusive, occurring in connection with the operations of Respondents described in paragraphs 1 to 16, inclusive, have a close, etc., relation to commerce among the several States and tend to lead to labor disputes hindering and obstructing commerce and its free flow; and that the aforesaid acts of the Respondent enumerated above in paragraphs 16 to 21, inclusive, constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (2) and (3) and Section 2, subdivisions (6) and (7) of said Act. In other words, the statements in paragraph 22 of favoritism upon the part of the Respondent Companies toward the International Brotherhood of Electrical Workers, are not embraced in or connected with the substantive and essential charges in the Complaint, but are plainly omitted therefrom. Said original Complaint and the Notice of Hearing and the Amended Notice of Hearing, of and upon said Complaint, were never served by said National Labor Relations Board or by its Regional Director for the Second Region, or caused by them or either of them to be served, upon your Petitioner, the International Brotherhood of Electrical Workers, at its well and generally known Office in the International Brotherhood of Electrical Workers Building at No. 1200 Fifteenth Street, N. W., in Washington, District of Columbia, or at any of its offices, nor upon any of your Petitioners, at said several Local Unions, hereinabove respectively mentioned, as composed of electrical workers and employes in the service of or in any manner associated or connected with said Consolidated Edison Company of New York, Inc., or any of its said Affiliated Companies. On the contrary, said original Complaint, Notice of Hearing and Amended Notice of Hearing were mailed, or caused to be mailed by said Board and its said Regional Director to the Office, No. 130 East Twenty-fifth Street, New York City, New York, of Local Union No. 3, composed of employes of electrical contractors, and having no connection or association with any of said Respondent Companies, and having not the slightest connection or concern with any of the matters or charges alleged in said Complaint or with any of said Local Unions of electrical workers and employes in the employ and service of any of said Respondent Companies, and having no interest in, relation to, or concern with the said Agreements entered into by and

and the Rules of the Board, both the original Complaint and notice of hearing of May 12, and the amended notice of hearing of May 25, 1937. The bald question here plainly presented is; In lieu of the non-joinder of Petitioners as parties to proceedings which resulted in an order abrogating their contracts, and in lieu of compliance by the Board with the provisions of the Act and of the Rules of the Board governing and requiring notice and service of process, and in view of the imperative rule of law

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between said respective Respondent Companies, said International Brotherhood of Electrical Workers, and said respective Local Unions aforesaid, or in or with the relations between said International Brotherhood and said Local Unions and said Respondent Companies. At said Office, 130 East Twenty-fifth Street aforesaid, of said Local Union No. 3, an alleged service of said Complaint was attempted to be acknowledged by one D. Kaplan, a member of said Local Union No. 3, and not an officer, representative or agent of your Petitioner, International Brotherhood of Electrical Workers, or of any of your Petitioners herein, and not connected in any way with any of said Respondent Companies, and not involved or interested in or concerned or connected with any of the matters, acts or things mentioned or complained of in said Complaint; and not authorized, competent or qualified, in any respect or manner, to accept or acknowledge service of any legal process or of any proceeding for or upon the part or behalf of said International Brotherhood of Electrical Workers or any of said Local Unions, the Petitioners herein. The Amended Notice of Hearing of May 25, 1937, was also mailed to said office of said Local No. 3 at 130 East Twenty-fifth Street aforesaid.

"Subsequently, said original Complaint, which, as aforesaid, omitted the allegations of paragraph 22 aforesaid from the material and substantial complaint which it preferred against said Respondent Companies, was for the first time, in a Third Amended Complaint, amended so as to make the allegations in paragraph 22 referable to interstate commerce and to alleged unfair labor practice proscribed by the Act. This was the first charge or accusation, so as aforesaid made in its Third Amended Complaint, by the said Board against any of the Respondent Companies of any alleged unfair practice under said Act with reference to the International Brotherhood of Electrical Workers; and this was done, for the first time, as aforesaid, after the hearing of and upon said Complaint, had been in progress for a number of days and the most important testimony for the Board in the Record, particularly that upon which the Labor Board in its said final decision and order mostly relied, namely the testimony of the C. I. O. witness, Harold Straub, and certain others, had been taken in several sessions of the hearing conducted by the Trial Examiner. Reference is here respectfully made to pages 518-523 of the Record of the proceedings at the hearing before the Trial Examiner, a true copy of

requiring an affirmative showing of personal jurisdiction *by the Board* by and from the Record, may there be, consistent with due process of law, such a thing as actual notice by estoppel, and in a proceeding by an administrative body, may such alleged actual notice by estoppel legally supply and support jurisdiction for an order which annihilates valuable contractual, personal and property rights. We respectfully submit that the tenets and traditions of our law answer the question decisively in the negative. In *Coe v. Armour Fertilizer Works*, 237 U. S.

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which said pages, for the convenience of this Honorable Court, is filed herewith marked "Petitioners' Exhibit No. 2."

"Eighth. Your Petitioners here, further, respectfully show that following said Amendment of said Complaint, as shown by said Third Amended Complaint, and by which said Amendment, for the first time the reference in said paragraph 22 to the alleged attitude and action of said Respondent Companies toward said International Brotherhood of Electrical Workers was brought within and made a part of said Complaint of unfair practices upon the part of said Respondent Companies under said Act, there was no service whatsoever of said Complaint as so amended, or of any notice of hearing thereupon, made, or caused or attempted to be made, by said Board, or its said Regional Director for the Second Region, or its said Trial Examiner conducting said hearing, upon your Petitioner, International Brotherhood of Electrical Workers, or upon any of your Petitioners, said respective Local Unions of electrical workers and employes in the employ and service of said Respondent Companies, respectively, or any of them.

"And your Petitioners respectfully show that upon and in the situation, so as above particularly described and ascertained, and without any change therein and without any amendment or supplementary proceeding by way of notice to or service of any proceeding whatever upon your Petitioners, or any of them, the said hearing proceeded until it was finally closed before said Trial Examiner, and on or about September 29, 1937, by Order of said National Labor Relations Board, was transferred to it at Washington, D. C.; that from the inception, issuing and filing of said original Complaint in said proceeding until said close of the hearing and proceeding before said Trial Examiner, and until after said proceeding had been, by said Order of the Board, "transferred and continued" before it at Washington, no notice thereof, and no copy of said Complaint and Charge, or of any Amended Complaint, and no Notice of Hearing or Amended Notice of Hearing upon any Amended Complaint, was ever served or caused to be served by said National Labor Relations Board or by its Regional Director for said Second Region, or by its said Trial Examiner, upon any of your Petitioners or upon any officer or official representative of any of them."

413, this Court, condemning a statute as embodying provisions repugnant to due process of law with respect to *notice* and *actual notice*, said:

"If a person against whom execution is thus issued as for an unpaid stock subscription does not happen to receive notice, extra-officially, *or receiving it makes no objection*, his property is taken in satisfaction of the corporation's debt—*manifestly without due process of law*. But, if it is said, plaintiff in error is not within that class; he *in fact learned of the execution before his property was sold or even his possession was disturbed, and he had an opportunity for a hearing in the present proceeding as to all questions upon which his liability depended*. The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.

"*Nor can extra-official or casual notice*, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the *due process of law that the Constitution requires*. In *Stuart v. Palmer*, 74 N. Y. 183, 188, * * * the Court said: 'It is not enough that the owners may *by chance* have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this Court.

"Thus, in *Security Trust & S. B. Co. v. Lexington*, 203 U. S. 323, 333, the Court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any

> form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, the Court said: *'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.'* In *Roller v. Holly*, 176 U. S. 398, 409, the Court declared: *'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.'* And in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.'"

But there is yet another consideration which, in itself, would seem to answer the Board's contention that the notice which it avers was given was sufficient to confer jurisdiction over Petitioners, even if such notice actually was given, and this consideration is that such notice would not have apprised Petitioners of the issues which were adjudicated in the Board's final Order, in so far as Petitioners were concerned, because neither the validity of the contracts nor representation was in issue, or embraced, in the Charge, the Complaint or amended Complaint, or raised at the hearings or at any other time before the Board's final Order, and, moreover, at no time during the hearings was any statement made by anyone that the validity of the contracts, or any question of representation or election, was in issue, but, on the contrary, statements were made during the hearing by the Board's counsel that such questions were not involved and that

the Complaint was not directed against the I. B. E. W. (R. 279,[2] 283,[3] 285 [4]; 525-526).

II.

THE BOARD'S AVERMENT THAT PETITIONERS DO NOT ASSERT THAT ANY PREJUDICE RESULTED TO THEM FROM THE FACT THAT THEY WERE NOT JOINED AS PARTIES IS PALPABLY ERRONEOUS.

Petitioners, at every stage of the proceedings, and in every petition, pleading and brief filed by them in this cause, have repeatedly asserted and insisted that the failure of the Board to join them as parties to proceedings which terminated in the Order of the Board annulling and rescinding Petitioners' contracts has resulted to their grave prejudice and serious detriment and loss. The averment of the Board in this regard (see Board's brief, pp. 5, 7) is not understandable in the light of Petitioners'

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[2] "Judge Ransom: Is it the statement on behalf of the Board that it is directing this complaint against the I.B.E.W.?

"Mr. Moscovitz: *No, it is not the position of the Board that this complaint is directed against the I.B.E.W.;* it is directed against the Consolidated Edison System, but it becomes necessary, in the proceeding on this issue, to develop certain facts and circumstances concerning *the relationship between the company and the I.B.E.W.*

"Judge Ransom: May I ask if the Board contends that any issue of representation is involved in this proceeding?

"Mr. Moscovitz: *There is no issue of representation involved in this proceeding.*"

[3] "Trial Examiner Gates: *We are proceeding on the complaint as it is in the record.*

"Judge Ransom: *We are proceeding on the complaint, and that complaint does not in any way challenge or attack the I.B.E.W.*—"

[4] "Mr. Moscovitz: * * * *This is not an action, and I would like to make this clear, against the International Brotherhood of Electrical Workers. This is an action against the Consolidated system because of its discharge of certain employees, and because, by this discharge of certain employees and other acts, it interfered with the organizational activities of its employees.* I think that is very clearly stated in the complaint, and I submit the testimony that is being elicited through this witness, and that will be elicited from other witnesses similar in vein to that which this witness has given, is in support of the allegations of the complaint."

consistent position that they were entitled, because of the abrogation of their contracts by the Board's Order, to be joined as parties, so that they might have exercised their legal rights to cross-examine witnesses produced against them, to present evidence in their own behalf, to file a brief, to argue the cause, and in all essential respects to have had a full hearing in proceedings which were finally turned and directed so disastrously against their rights and interests.

The Board argues, on this point, that "Having had actual knowledge of the proceedings" the Petitioners could have availed themselves of the "opportunity provided by Section 10 (b) of the Act to "intervene and participate". But the Petitioners certainly did not have actual knowledge of any proceedings disclosing an intention or purpose to affect them or their rights, much less to terminate, annul and destroy their contracts. On the contrary, as references to the Record disclose, the assertion was made for the Board that the proceeding involved no question of representation and was not directed against the I. B. E. W. The Board, in this regard, loses sight of the important fact which must be conceded by it, that the proceedings before the Board were not initiated for the purpose of invalidating the contracts, and that the invalidation of the contracts was not necessary to a complete adjudication of the cause as initiated and presented, and, further, that neither the original charge of the United of May 5, nor the Complaint as several times amended, made any charge against the Petitioners or raised any issue as to the validity of the contracts or as to representation, and, in addition, no amendment of the Complaint until that of June 14, affected Petitioners under or within the Act.

Furthermore, had there been any issue as to the contracts or affecting the rights of Petitioners, and had they even been given actual notice of the proceedings or had actual knowledge of such issues, and had Petitioners availed themselves of the "opportunity" (not the right) to intervene, as provided by Section 10 (b), there would still have been no compliance with due process of law because the "intervention" referred to in that Section and in Article II, Section 19, of the Rules of the Board is so absolutely discretionary and so partial and limited that, where substantive property and personal rights are involved, it seriously fails to gratify constitutional requirements. Reference to the Section and the Rule reveals that even when intervention is permitted (and in the instant case two applications by independent labor unions were denied) the intervenor's activities are mandatorily limited by the Act to the mere privilege of *presenting testimony*. There is no right to be confronted with or to cross-examine witnesses, nor to invoke the processes of the Board relating to the summoning of witnesses or the production of papers or other evidence, nor to present evidence other than testimony, nor to argue the cause or to be heard on any question of law or fact, nor to file a brief, nor to do any other of the things customarily and ordinarily done at the hearing or trial of a cause in the defense and protection of the rights or interests of a party litigant.

The Board argues, further, that because Petitioners proceeded to petition the Court below for review pursuant to Section 10 (f) of the Act, "they could have applied to the Court below for leave *to adduce additional evidence* (Section 10 (e) and (f)) and thus remedied their

failure to appear in the hearings before the Board's Trial Examiner." In so far as this argument of the Board is critical of Petitioners' procedure, we submit that it is patently unfair because, had the Board in the first instance complied with the Act, its own Rules and Regulations, and the common concepts of fair play and due process of law, a situation requiring resort to the Court below for "leave to adduce additional evidence" under Section 10 (e) would certainly never have arisen.

But, exclusive of this, the fallacy of this argument of the Board is obvious because, assuming that the Court below would have granted to Petitioners the full relief as to "additional evidence" which Section 10 (e) provides, such relief would neither have remedied the prejudice inflicted upon Petitioners by the Board's original deviations from the Act, its Rules, and due process of law, nor have afforded Petitioners their day in Court or the full and fair hearing to which they were and are entitled under the Fifth Amendment to the Constitution. The pertinent portion of Section 10 (e) is:

> " • • • If *either party* shall apply to the Court for leave to adduce *additional* evidence *and* shall show to the satisfaction of the Court that such *additional* evidence is material *and* that there were reasonable grounds for the failure to adduce *such evidence in the hearing before the Board* • • • the Court may order such additional evidence to be taken before the Board • • • and to be made a part of the transcript • • •."

It is thus plain that, if the Court below, in the exercise of its discretion, had ordered "additional evidence" to be taken before the Board, Petitioners would have been

confined and limited in the protection of their rights solely to the taking of the same. They could not have had the right to be confronted with or to cross-examine the Board's or any other witnesses, no right to file a brief with, or to argue the cause, or to be heard on any question of law or fact before the Trial Examiner or the Board, no right to do any of the things customarily and ordinarily done at a hearing or trial of a cause in the defense or protection of rights or interests of a party litigant, except to adduce evidence. This mere right would not have afforded the full and fair hearing to which Petitioners were entitled by due process of law before the Board ordered the destruction of their property.

The Board, on this point, further maintains that "by failing so to apply (to adduce additional evidence), Petitioners evinced their approval of the record, and cannot here claim lack of opportunity to supplement it". This conclusion is plainly untenable, because Petitioners, in their challenge, in the Court below and in this Court, of the proceedings and of the Board's findings and Order as fundamentally illegal and unconstitutional, did and do now deny the legal sufficiency of the proceedings, as established in the Record, to sustain the Board's Order.

Suffice it to say, in reply to the Board's concluding and summarizing paragraph on this point, that Petitioners' challenge of paragraphs 1 (f) and (g) of the Board's Order is neither a formal nor a technical one, but is based upon and invokes the fundamental guaranties of due process of law which are protected against invasion and denial by the Fifth Amendment to the Constitution.

III.

THE AUTHORITIES CITED BY THE BOARD IN SUPPORT OF ITS CONTENTION THAT PETITIONERS WERE NOT INDISPENSABLE PARTIES TO THE PROCEEDINGS WHICH RESULTED IN THE ORDER ANNULLING PETITIONERS' CONTRACTS INVOLVED DIFFERENT SITUATIONS FROM THAT IN THE INSTANT CASE, AND ARE NOT IN POINT.

National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, has been distinguished in Petitioners' principal brief (see brief, pp. 16, 22-23).

United Shoe Machinery Co. v. United States, 258 U. S. 451, is in no respect in conflict with Petitioners' position here. In that case the rule was stated to be that *parties whose rights are injuriously affected are indispensable*, but that there, because the covenants which were declared invalid had been made for the benefit of the party who had been joined and proceeded against, the other parties to the covenants, *whose rights were not injuriously affected*, were dispensable. Here, Petitioners unquestionably had valuable and beneficial interests in the contracts which the Board's Order annulled, and for that reason were indispensable parties within the rule as affirmed in that case.

In *Meyer v. Washington Times Co.*, 76 F. (2) 988, the question of parties was neither involved in the case nor discussed by the Court.

New York Phonograph Co. v. Jones, 123 F. 197, involved an action for injunction to restrain the defendant from interfering with contractual rights of the *plaintiff* with a third party. The defendant had no contractual rights with the third party, and it was held that the latter was not indispensable to the suit for that reason and be-

cause "the knowledge which (was) charged to the defendant of the contractual relations (of plaintiff) is the essence of the charge." Thus that case and the one at hand clearly are dissimilar, both in the facts and in the questions involved.

In *E. L. Husting Co. v. Coca-Cola Co., et al.*, 194 Wis. 311, 205 Wis. 356, as in the *New York Phonograph Co.* case above, the proceeding was against defendants to enjoin interference by them with a contract between plaintiff and a third party, *who was actually joined as a defendant.* Defendants were not parties to the contract in question between the third-party defendant and plaintiff, and the point of joint contractual rights of such defendants was not involved. The third-party defendant was beyond the jurisdiction of the Court and *was not amenable to service of process,* and the Court there said (p. 320):

> "Any judgment here in plaintiff's favor against any or all of the answering defendants would, the Western Company (non-resident third party), not being a party, *in no sense be binding on that company so far as plaintiff is concerned, and vice versa.*"

In this case the Board's Order does not enjoin any third person from interfering with the contracts between these Petitioners and the Companies, but destroys the joint and mutual rights of these Petitioners and the Companies under their contracts, without making these Petitioners parties, or giving them legal notice of a proceeding having that destructive purpose in view.

Nokol v. Beeker, 318 Mo. 292, is similar to, and cites, the *New York Phonograph Co.* case. Again, as in *E. L. Husting Co. v. Coca-Cola Co., supra,* the contracting party was *actually joined* as a party defendant, but was not sub-

ject to service of process *because it was a foreign corporation not doing business in Missouri.* The Court said:

> "Accordingly, where by reason of their *absence from the jurisdiction of the Court,* or excessive number, or the fact that they are unknown, or other sufficient cause, it is wholly impracticable or exceedingly difficult or inconvenient to make all persons materially interested parties, the court will dispense with the general rule and proceed to a decree where this can be done without manifest injustice either to the parties before the Court or to interested parties who have not been brought in, *but not otherwise.*"

The situation in the instant case does not bring it within any of the exceptions warranting the omission of parties, as such exceptions are stated in the case above relied upon by the Board. None of Petitioners was absent from or beyond the jurisdiction of the National Labor Relations Board, all of them could have been made parties and legally summoned as such, nor was there an excessive number of parties in interest, nor were Petitioners or their addresses unknown to the Board (see testimony of Board's witness Straub, R. 256, 273, 276, 277). It would have been wholly practicable and perfectly convenient to have made Petitioners parties and to have served them with process in accordance with the Act—a situation which the Board does not deny or question. It is submitted that the decision cited distinctly supports, rather than contravenes, Petitioners' contentions on this point.

Alcazar Amusement Co. et al. v. Mudd & Colley Amusement Co., 204 Ala. 509, likewise involved an action to restrain a defendant, who was not a contracting party, from breaching Plaintiff's contract with a third person. The latter, although actually joined as a party defendant, was

a *non-resident* upon whom service could not be had. That case thus affords no support to the Board's argument.

In *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, and in *Buttrick Co. v. Federal Trade Commission*, 4 F. (2) 910, the question of parties was neither raised nor argued, nor was it passed upon or even discussed in the respective opinions.

General Investment Co. v. Lake Shore and Michigan Southern Ry. Co., 260 U. S. 261, has been commented upon in Petitioners' principal brief (p. 24). The Board claims that Petitioners refer to a different portion of the opinion than the Board does; but reference to the part referred to by the Board shows that the holding the Board relies upon was merely that a person owning a "stockholding interest" in a corporation is not an indispensable party to an action to enjoin such corporation "from entering or consummating (a) proposed consolidation". This, distinctly, is not the situation here.

Roos v. Texas Co., 23 F. (2) 171 (C. C. A. 2), *in which a bill was dismissed for want of indispensable parties*, wholly supports Petitioners' position that (as the Court there said), "rescission of a contract, or declaration of its invalidity, as to some of the parties, but not as to others" is not permitted. That case cites many of the decisions of this Court relied upon by Petitioners in their principal brief (see Brief, p. 25).

New Orleans Debenture Co. v. Louisiana, 180 U. S. 320, holds, on the question of parties, that, in an action in the nature of *quo warranto* to forfeit the charter of a corporation, even though such corporation is not legally organized, "it is not necessary that the individuals who were corporators or officers of the company be made de-

fendants or service of process be made upon them. The company itself may be brought into court by service upon its officers appointed pursuant to the charter under which it assumed to act". The Board maintains (see Board's Brief, p. 11) that that case is authority for the proposition that "The purpose and end of the rule (as to indispensable parties) is, therefore, fully satisfied if an appeal is taken by indispensable parties who were not joined in the court of first instance and if, on such appeal, opportunity to present objections to the validity of the decree is afforded. In such circumstances the Court has decided that any defect of parties is cured, and does not warrant reversal". That case does not so hold, because, in the first place, the individual corporators and officers were not, as the excerpt from the Court's opinion above quoted shows, held to be indispensable parties. And in the second place, the Court based its holding on the fact that (p. 331):

> "The original decree was entered after a trial upon the merits and the record shows that the officers and many of the stockholders were present at the trial, *and were witnesses and examined by the counsel for the company, and that in truth they made the whole defense.* * * * The corporators have not in any manner been impeded or embarrassed in the presentation of their defense by not being formal parties. * * * Many were present, as a matter of fact, and the defense which they interpose is *one of law upon undisputed facts.* There has been no taking of any property belonging to stockholders * * *."

An important feature which clearly distinguishes the case immediately above, as well as the cases of *American Surety Co. v. Baldwin*, 287 U. S. 156, and *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, relied upon by the

Board in support of its argument that Petitioners' application for review subsequent to the Board's order cured the defect of non-joinder, and that due process does not require a hearing prior to judgment if defenses may be presented on appeal, is that the rule pronounced in those cases applies *only where there is involved a question of law, and not when questions of fact are in issue.* The Court in the *New Orleans Debenture Co.* case emphasized *that the question was solely one of law,* and reference to *the other cases reveals the same situation.* In each of the two latter cases this Court stated that "Due process requires that there be an opportunity to present *every available defense.*" Obviously, where the sole question is one of law, the court on appeal is enabled to pass upon the question fully, and parties may, as well, fully present their cause; but when, as in the instant case, important questions of fact are involved, and no right of confrontation, cross-examination and full hearing has been afforded, an appeal or opportunity for review does not afford to parties "opportunity to present *every available defense*" which due process of law requires.

IV.

THE ARGUMENT OF THE BOARD THAT THE ACT "FORBADE", "PROHIBITED" AND MADE "IMPOSSIBLE" THE JOINDER OF PETITIONERS AS PARTIES TO PROCEEDINGS RESULTING IN THE ORDER DESTROYING THEIR PROPERTY DOES NOT FIND SUPPORT IN THE PLAIN PROVISIONS OF THE ACT. SUCH CONSTRUCTION WOULD MAKE THE ACT, AS APPLIED HEREIN, UNCONSTITUTIONAL, AND THE ORDER OF THE BOARD NULL, VOID AND IN CONFLICT WITH THE FIFTH AMENDMENT TO THE CONSTITUTION.

In support of its contention that the Act forbade, prohibited and made impossible the joinder of Petitioners to the proceedings before it, the Board refers to Section

10 (b) of the Act which authorizes it to serve a complaint upon persons charged with engaging in unfair labor practices; Section 8, defining unfair labor practices by an employer; and Section 2 (2), in which a labor organization is declared not to be an employer. Although the Board interprets these Sections of the Act to mean that it was *impossible* for it to have joined Petitioners as parties, it is nevertheless respectfully submitted that such an interpretation is erroneous, and that the Board had full and complete authority, had it desired to do so, to have joined these Petitioners; and further, in view of the invalidation of Petitioners' contracts, it was constitutionally imperative upon the Board to have joined them and to have secured to them due process of law, in accordance with the Fifth Amendment. The construction placed upon the Act by the Board is in manifest derogation of the law of the land and of common right and justice.

The findings and declaration of policy, stated in Section 1 of the Act, contain nothing which may be construed as countenancing the contention here made by the Board, but, on the contrary, would seem plainly to indicate that, in effectuating the purposes of the Act, the Board's powers and duties were intended by the Act to be exercised in accordance with, and not in violation of, fundamental constitutional requirements; and, therefore, to join as parties to proceedings before it, all persons having substantive property or personal rights and interests in the subject-matter and object of the proceeding in which the Board is to exercise jurisdiction.

And the various principal provisions of the Act, defining the powers and directing the duties of the Board, indicate, also, a pervading intent that all such powers and

duties are designed to accord with and obey the provisions of the Constitution, the Law of the Land, and their traditional requirements of fairness and justice. All of the decisions of this Honorable Court upon the Act distinctly indicate that it is to be so construed.

And the doctrine is fundamental and familiar that legislation is to be construed, whenever and as far as possible, in accordance with, and not in contravention of, the demands of the organic law.

The Board's contention, here under consideration, would deny and exclude the vital power and duty upon its part to bring before it as parties to its proceedings, persons whose property and personal rights, inestimably precious and valuable, are definitely involved, and subject to annullment and deprivation in such proceedings before it. In other words, and plainly stated, the Board here claims the power, under the Act, to destroy the property of persons whom it has no power to bring before it as entitled to a hearing and all the securities and protection vouchsafed to the citizen by due process of law. It is earnestly submitted that this cannot conceivably accord with the Constitution and the Bill of Rights embraced in the Amendments. And if the Act may be so construed and applied in denial of constitutional rights, such construction and denial would render the Act unconstitutional and void.

And, having regard to the instant case, it is earnestly submitted, on behalf of the Petitioners, that if the Act may be construed and executed, as the Board contends, as prohibiting and making it impossible to join these Petitioners to the proceeding here in question wherein the property and contractual rights of these Petitioners may

be and have been destroyed, without legal notice of such intended proceeding, without legal process issued to and served upon them, and affording them the right and protection of a full hearing to defend their property and maintain their rights before the tribunal assuming jurisdiction to destroy both, and culminating in a judgment actually destroying both, then the Act, so construed and applied, and the Order and judgment of the Board pursuant thereto, are unconstitutional and void as in conflict with the due process guaranteed by the Fifth Amendment.

Statutes which omit to provide for the fundamental guaranties of due process, such as notice and hearing, or joinder of persons who may be injuriously affected under the operation of such statutes, are unconstitutional in their application, and proceedings conducted and orders or requirements issued under them, in deprivation of substantial rights and property, are nullities. "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." *Louisville & Nashville R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144.

See also:

Coe v. Armour Fertilizer Works, 237 U. S. 413
Security Trust & Sav. Bk. Co. v. Lexington, 203 U. S. 323, 333
Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138
Roller v. Holly, 176 U. S. 398, 409
Chicago R. Co. v. Minnesota, 134 U. S. 418.

CONCLUSION.

It is respectfully submitted that the judgment of the Court below was and is erroneous in the particulars specified and for the reasons set forth by the Petitioners in this cause, and should be reversed, and that the Order of the Board, in said particulars, should be vacated and set aside.

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